IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH

C.E.A. No. 95 of 2007

Date of Decision: 4.10.2007

Commissioner of Central Excise, Chandigarh

...Appellant

Versus

M/s Nachiketa Paper Limited, Derabassi

…Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Ms. Naveender P.K.Singh, Advocate,

for the appellant.

M.M. KUMAR, J.

The Revenue has filed the instant appeal under Section 35G of the Central Excise Act, 1944 (for brevity, 'the Act'), challenging order dated 5.2.2007, passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for brevity, 'the Tribunal'), claiming that a substantial question of law would arise for determination of this Court. The Tribunal has held that the Revenue has failed to produce any evidence of clandestine removal and sale of goods. It has further been found as a fact that the demand of duty on raw material found short is based on the presumption that the raw material must have been used in manufacturing final products, which was ultimately cleared without payment of duty. The Tribunal has

noticed the undisputed fact that demand of duty on raw material is based on the quantification of the production, which is worked out on the basis of input and output ratio and in any case, the assessee-respondent had paid duty on the shortage immediately after the ascertainment.

Brief facts of the case are that the assessee-respondent is a company engaged in the manufacture of writing, printing and newsprint paper. It was using waste paper as their main raw material for the manufacture of their final products. Acting on the report of an intelligence report, the appellants visited the factory premises of the assessee-respondent on 18.2.2003. On preliminary enquiry, it was observed that the unit had been availing the benefits of exemption notification No. 6/.2002-CE dated 1.3.2002 at nil rate of Central Excise duty @ 16% Adv. w.e.f. October, 2002. The assessee-respondent had also been availing the exemption on newsprint manufactured by them. The visiting officers also conducted physical verification of the stocks of finished goods and raw material lying in the factory in the presence of Shri Vijay Mittal, Director of the Company. On verification, the stock of writing and printing paper (sheets) was found 13.565 MT as against the recorded balance of 17.470 MT resulting into shortage of 3.905 MT valued at Rs. 76,148/- involving Central Excise duty of Rs. 12,184/-. Likewise raw material stocks were also verified and there was shortage of 127.794 MT in the stock of waste paper. When the Visiting Officers enquired about these shortages, Shri Vijay Mittal, Director of the firm in his

statement dated 18.2.2003 stated that he was not in a position to explain about the shortages as he was ill and was not regularly attending the factory. He further stated that in his absence some employees of his unit might have indulged in removal of finished goods without accounting for the same in the records, without payment of duty and without counting of raw material used in the manufacture of such finished goods. On further inquiry, Shri Vijay Mittal failed to reply as to whom these goods had been sold. Shri Vijay Mittal, however, admitted the fact of manufacture of 89.635 MT of paper board, based on the percentage of yield obtained in last three months, which arrived at 70.14% out of 127.794 MT of waste paper that was found short. He also undertook to deposit the Central Excise duty of Rs. 1,53,598/- and Cess amounting to Rs. 1,200/- on 89.635 MT in respect of paper Board valued at Rs. 9,59,988/- and total duty of Rs. 2,03,006/- and Cess amounting to Rs. 1491/- on the shortage of finished goods. Accordingly the assessee deposited duty amount of Rs. 2,04,498/- on 10.4.2003. After going through the records, the Adjudicating Authority confirmed the demand of Rs. 2,04,497/- alongwith interest and imposed equal penalty.

On appeal filed before the Commissioner (Appeals) Central Excise, the order of the Adjudicating Authority was upheld despite the fact that calculation of duty was found to be based on the raw material found short that was based on the presumption that the said raw material must be used in the manufacture of final products, which were ultimately cleared without payment of duty. The burden

of furnishing explanation has also been placed on the assessee-respondent for the shortage of raw material to the tune of 189.145 MTs. The excuse of wrong counting has not been accepted on the ground that the quantity found short was huge.

The assessee-respondent approached the Tribunal and vide order dated 2.3.2005, the Tribunal set aside the penalty imposed under Section 11AC of the Act and allowed the appeal filed by the assessee-respondent. The order of the Tribunal was challenged before this Court in CEA No. 135 of 2005. This Court vide order dated 25.9.2006 set aside the order of the Tribunal and remanded the matter back to the Tribunal for fresh decision in accordance with law. The observations made by this Court are as under:

> " We have already gone through the matter in our order dated 25.7.2006 in CEA No. 13 of 2005 (Commissioner of Central Excise Delhi III v. M/s Machino Montell (I) Limited and another) and held that mere deposit before issuance of show cause notice was not conclusive for not imposing penalty and the matter had to be gone into on merits."

After remand, the Tribunal has again passed an order dated 5.2.2007 (Annexure A/6) holding that the penalty under Section 11AC of the Act was not leviable as there was no evidence of clandestine removal and sale of goods. The view of the Tribunal is discernible from para 5 of the order which reads as under:

> " After hearing both sides and on perusal of the

record, it appears from the impugned orders that the demand of duty on raw material found short is based on the presumption that the said raw material must have been used in the manufacture of the final products which were ultimately cleared without payment of duty. It is undisputed fact that the demand of duty or (sic., on ?) raw material is also based on the quantification of the production on the basis of the input and output ratio. So, the department failed to produce any evidence of clandestine removal and sale of the goods. Be that it as it may, there was a shortage of raw material and finished goods and the appellants paid duty on the said shortage immediately after the ascertainment of the shortage, as such, it cannot be a case where duty of excise has now been paid by reason of fraud, collusion or any willful mis-statement or suppression of fact or contravention of any provision of the Central Excise Act or Rules made thereunder with intent to evade payment of duty and, therefore, Section 11AC of the Central Excise Act, 1944 cannot be invoked. Accordingly, the impugned orders in so far as the imposition of penalty under Section 11AC of the Central Excise Act, 1944 are not as me (sic) and appeals are allowed with consequential relief, if any."

Ms. Naveender P.K. Singh, learned counsel for the appellant-revenue has argued that the Tribunal could not have

ignored the admission made by Shri Vijay Mittal, Director of the assessee-respondent company, wherein he has conceded shortage of raw material. In support of her submission she preferred to cite judgments of the Tribunal in the cases of **Commissioner of Central Excise, Chandigarh v. Pushpanjali Steel Alloys P. Ltd., 2004 (166) ELT 59 (Tri.-Del.); Commissioner of Central Excise, Chandigarh v. Nabha Steels Ltd., 2004(169) ELT 0345 (Tri.-Del.); Prabhat Polycoaters v. Commissioner of Central Excise and Customs, Surat, 2002(147) ELT 0701 (Tri.-Mumbai);** and **Sainsons Paper Industries Ltd. v. Commissioner of Central Excise, Delhi III, 2003(158) 0782 (Tri.-Delhi)**. Learned counsel has insisted for citing of those judgments and also for considering the same for disposal of the instant appeal.

Having heard learned counsel we are of the considered view that the findings recorded by the Tribunal in para five of the order as reproduced above are unassailable and same are not open to any challenge. The Tribunal has observed in essence that findings with regard to fraud, collusion or any willful mis-statement or suppression of fact for the purposes of Section 11AC of the Act could not be based on suspicion and presumption. The demand of duty on raw material found short has been found to be based on presumption that short raw material must have been used in the manufacture of final products which must have been cleared without payment of duty. It is undisputed that demand of duty on the raw material was also based on the quantification of the production calculated on the

input and output ratio. The department did not produce any evidence of clandestine removal and sale of goods which may lead to a conclusion that duty of excise was paid by reason of fraud, collusion or any willful misstatement or suppression of fact or contravention of any provisions of the Act or Rules with the intention to evade payment of duty. It is in these circumstances that the Tribunal disagreed with the view taken by the Adjudicating Authority as upheld by the Commissioner (Appeals) for imposition of penalty under Section 11AC of the Act and deleted the penalty. Therefore, we find no legal infirmity in the view taken and accordingly the appeal is liable to be dismissed.

The argument of learned counsel that the judgments delivered by the Tribunal in the cases of Pushpanjali Steel Alloys P. Ltd.(supra), Nabha Steels Ltd.(supra); Prabhat Polycoaters (supra) and Sainsons Paper Industries Ltd. (supra) have to be taken into account by this Court as precedents does not require any detailed consideration. The orders passed by the Tribunal do not constitute precedents to be cited before the High Courts because the Tribunals are necessarily the final Courts of recording the findings of facts. Moreover, the jurisdiction of the Tribunal under Sections 35A and 35C of the Act is entirely different than the power of this Court conferred by Section 35G of the Act. The Tribunal has been clothed with the power nay duty of confirming, modifying or annulling the decision or order appealed against passed under Section 35A of the Act by the Commissioner (Appeals) whereas the High Court under

Section 35G of the Act could exercise power in cases involving substantial question of law. In the present case, the findings recorded by the Tribunal are based on evidence. The principle applies to the facts of the instant case is that suspicion cannot replace the requirement of proof by presuming that there was intention to evade duty. It has been found as a fact that no *mens rea* for evasion of payment of duty was present. We would have refrained from dealing with such a trite proposition but for the insistence of the counsel for the revenue-appellant.

For the reasons afore-mentioned this appeal fails and the same is dismissed. In view of the dismissal of appeal on merit, we do not consider it necessary to pass any order on the application filed under Section 5 of the Limitation Act, 1963, for condonation of delay of 15 days in filing the appeal.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

October 4, 2007
Pkapoor

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